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IN THE

Supreme Court of the United States

No. 458

DR. HENRY L. PECKHAM, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Dr. Henry L. Peckham, Jr., by his counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the United States District Court for the District of Columbia.

OPINION BELOW

The Opinion of the Court of Appeals is attached to this Petition and has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1955. Petition for Rehearing was denied on August 31, 1955. Petition for Rehearing En Banc was denied

on September 9, 1955. Associate Justice Black entered an Order extending the time within which to file Petition for Writ of Certiorari to October 10, 1955.

QUESTIONS PRESENTED

1. *Was not the Petitioner denied the protection of the Sixth Amendment* and the right to be informed of the nature and contents of the charge against him *when he was indicted for aborting a pregnant woman and was misled into a defense on the materiality of pregnancy* only to be met at the conclusion of the testimony by the sudden pronouncement of the Trial Judge, *sua sponte*, that the pregnancy alleged in the indictment was surplusage and that all Government testimony and all Petitioner's testimony on this issue was immaterial?

2. Does not the legislative history of Title 22, Section 201 of the D. C. Code conclusively show that Congress passed an ordinary every-day abortion statute in vogue in the great majority of the states which requires the Government to show pregnancy as a material element of the offense and does not the ruling of the court below that pregnancy was eliminated as a material element under the statute violate the legislative history of the Act and is it not contrary to this Court's repeated pronouncements that repeals by implication are not to be indulged in, particularly in criminal statutes?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 22, Section 201, D. C. Code:

> "Whoever with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug or substance whatever, or with like intent uses any instrument or means unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than 5 years;

or if the woman or her child dies in consequence of such act, be imprisoned for not less than 3 nor more than 20 years."

Sixth Amendment to the Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

Petitioner, Dr. Henry L. Peckham, Jr., a doctor of medicine in the District of Columbia was indicted for violation of Title 22, Section 201 of the D. C. Code alleging that he procured the abortion of one Mary Lee Ott who was then pregnant (Pet. Ap. 1a). The prosecuting attorney in his opening statement stated he would show by the evidence that the complaining witness was pregnant on or about May 2, 1951 (Pet. Ap. 2a-3a). The complaining witness, Mary Lee Ott, testified that she was pregnant in January of 1951 and testified further that Petitioner examined her and verified that she was pregnant (Pet. Ap. 2a-4a). The complaining witness testified that she went back on May 2, 1951 and that Petitioner performed an abortion on her (Pet. Ap. 2a-4a). The complaining witness testified she passed a fetus in the Hotel Harrington which was witnessed by her boy friend George Christiansen (Pet. Ap. 2a-4a). She testified the fetus was 8 inches long and 5 inches wide. The complaining witness had also testified that a Dr. Halstead had examined her and had informed her she was pregnant. The Petitioner denied that the complaining witness was pregnant when he examined her

on May 1, and May 4 of 1951. The Petitioner called as a witness Dr. Michael Miller who testified that it would have been medically impossible for the complaining witness to have aborted a fetus as she had described. Petitioner also called Dr. Halstead who denied he had ever seen the complaining witness or had told her she was pregnant. (Pet. Ap. 4a) The Government called one Dr. Christopher Murphy who also testified that it would have been medically impossible for the complaining witness to have passed a fetus such as she described in her testimony (Pet. Ap. 4a-5a). Throughout the course of the trial, the Trial Judge expressly stated on more than one occasion that pregnancy was material and that Petitioner's counsel could cross examine or introduce any evidence to rebut pregnancy (Pet. Ap. 3a). At the conclusion of all testimony, ~~for~~ counsel that pregnancy was immaterial. After a prolonged argument, the Trial Judge ruled that the prior opinions of the United States Court of Appeals for the District of Columbia Circuit were obiter dicta and that he was not bound by them. The case was submitted to the jury with the instruction of the Trial Judge that they could convict the Petitioner even though the complaining witness were not pregnant as alleged in the indictment. The jury returned a verdict of guilty and Petitioner was sentenced to serve 20 months to 5 years in the Penitentiary.

the trial judge suddenly informed

REASONS FOR GRANTING THE WRIT

1. Petitioner Was Denied the Protection of the Sixth Amendment and the Right to be Informed of the Nature and Contents of the Charge Against Him When He Was Indicted for Aborting a Pregnant Woman and Was Misled Into a Defense on the Materiality of Pregnancy Only to be Met at the Conclusion of the Testimony by the Sudden Pronouncement of the Trial Judge That the Pregnancy Alleged in the Indictment Was Surplusage and That All Government Testimony and All Petitioner's Testimony on This Issue Was Immaterial

Petitioner was charged with the crime of abortion *and it was alleged in the indictment that he aborted a woman who was pregnant on or about May 2, 1951.* The substantial constitutional issue which was regrettably not even discussed in the Opinion of the court below is *whether the Petitioner Dr. Peckham was denied the effective protection of the Sixth Amendment* to be informed of the nature of the charges against him and the concomitant right to the effective assistance of counsel *when his whole defense prior to trial* and *at the time of trial* was *devoted to contesting the allegation of pregnancy in the indictment* only to be told by the Trial Judge *sua sponte* at the conclusion of all the testimony that he now considered pregnancy to be immaterial both in the indictment and in the proof; that prior Appellate rulings to the contrary were obiter dicta and that he would instruct the jury to convict the Petitioner even if they believed that the woman was not pregnant as alleged in the indictment.

Prior to trial the prejudicial nature of the variance which occurred in this case can best be demonstrated by the following factors which Petitioner's counsel had before him prior to trial:

Petitioner's Preparation Prior to Trial

1. Petitioner's counsel had the indictment before him which alleged that the complaining witness was pregnant on May 2, 1951 (Pet. Ap. 1a).

2. Petitioner's counsel had the record of this very trial before him (Peckham vs. U. S., 210 F. 2d 693—judgment reversed).

3. In the first Peckham trial both the Government and the defense recognized that pregnancy must be shown beyond a reasonable doubt and the Trial Judge had instructed the jury in the first case as follows:

> "The elements of the offense that the Government must establish are as follows: (1) That the defendant prescribed or administered to the woman named in the indictment a medicine, drug, or other substance, or used on her some instrument or means (2) *that the woman was pregnant* at the *time this was done* (3) that the defendant did the act with the intent to procure a miscarriage."

4. There was also before counsel the ruling of the United States Court of Appeals in Peckham vs. U. S., supra, where they specifically approved the instruction of the trial court which included pregnancy as a constituent element of the offense. The court stated:

> "But the court did in fact require the Government to establish that defendant prescribed or administered a medicine, a drug, or other substance, or used on the woman some instrument or means, *that she was pregnant at the time*, and that the defendant did the act with the intent to procure a miscarriage."

5. Counsel had before him the record referred to in the footnote of the lower court, Crichton vs. United States, 92 Fed. 224, 67 Ap. D.C. 300, where both the *defendant and the Government conceded that pregnancy must be proven* beyond a reasonable doubt but on appeal the defendant contended that the evidence was insufficient to prove pregnancy beyond a reasonable doubt. To this argument the Court of Appeals replied in their Opinion:

> "The statute prohibits the use by any person of any substance or instrument for the purpose of procuring the *miscarriage of any pregnant woman* unless when such use is necessary to preserve the life or health of the woman."

6. Counsel had before him the decision of Judge Siddons decided in 1928 in U. S. vs. Hoffman, 56 Wash. Law Reporter 449, wherein the court stated the essential elements necessary to convict under the abortion statute and he stated:

> "The offense under the statute is permitted *if the woman be pregnant* and whether she is quick with child or not. Its purpose is to make it a criminal offense to interfere with the orderly process of nature where pregnancy has taken place, unless it be to preserve the life or health of the pregnant woman."

7. Counsel had before him the records and *opinions of all prior abortion cases* decided in the District of Columbia and in each and every one of them pregnancy was considered a constituent element of the offense. These opinions were:

(1) Hart vs. United States, 70 App. D.C. 269, 105 F. 2d 592.

(2) Williams vs. United States, 78 App. D.C. 147, 138 F. 2d 181.

(3) Goodloe vs. United States, 88 App. D.C. 102, 188 F. 2d 621.

8. Petitioner's counsel also had before him the prior abortion trials of Petitioner in which he was acquitted and they are:

(1) United States vs. Henry L. Peckham, Criminal No. 1264-50, U. S. District Court.

(2) United States vs. Henry L. Peckham, Criminal No. 1026-47, U. S. District Court.

In each one of these cases the jury was instructed that *pregnancy was a material and constituent element* under the Abortion Statute which must be proven beyond a reasonable doubt.

Now the Petitioner's counsel has portrayed all the information at his disposal prior *to trial and which guided* him in preparing the petitioner's defense *which was to*

the offense. However, *when all the testimony was in the Trial Judge suddenly reversed himself and confronted Petitioner's counsel with his pronouncement that the pregnancy alleged in the indictment was surplusage, that the Appellate rulings in the United States Court of Appeals for the District of Columbia Circuit were contrary obiter dicta; that all evidence on the issue of pregnancy introduced by the Petitioner was immaterial and that the jury could convict the Petitioner for abortion even if they did not believe she was pregnant on May 2, 1951 as alleged in the indictment.* This is reflected by the following statement of the court:

> "THE COURT: The Crichton says something about pregnant, but I think that is surplusage and dicta . . ."

Petitioner entered his objections and tendered instructions in accordance with his understanding that pregnancy was material which were overruled by the Trial Judge *and the jury was told that they could convict the Petitioner even if the complaining witness were not pregnant as alleged in the indictment.*

This ruling of the Trial Judge constituted a fatal prejudicial variance for the Petitioner and denied him due process of law and the protection of the Sixth Amendment. *He prepared a defense both prior to trial and at trial to a charge of aborting a pregnant woman on May 2, 1951.* When all the testimony was in, the issue of pregnancy was suddenly ruled immaterial. This denied the Petitioner the protection of the Sixth Amendment and was the very proposition discussed by Mr. Justice Sutherland in *Berger* v. *United States,* 295 U.S. 78, wherein he stated:

> "In Washington and G & R Company vs. Hickey, 166 U.S. 521, 41 L. Ed. 1101, 17 S. Ct. 661, this Court said that 'No variance ought ever to be regarded as material where the allegation and proof substantially correspond or where the variance was not of a character *which could have misled the defendant at trial.*'"

The decision of the lower court is in conflict with the rulings of other Circuit Courts of Appeal for it has been consistently held that there is an effective denial of the rights guaranteed by the Sixth Amendment when there is a *variance during the course of the trial which has prejudicially misled the accused in the preparation of his defense.* In this connection see *Mathews* v. *United States,* 8th Circuit, 15 F. 2d 139; *Burke* v. *United States,* 9th Circuit, 58 F. 2d 739 and *Cromer* v. *United States,* 142 F. 2d 697.

The record in this case conclusively shows that the Petitioner's defense was misled for it was predicated upon pregnancy as being material only to be met, when all testimony was in, by the ruling of the Trial Judge that pregnancy was *immaterial which vitiated the Petitioner's defense.*

Petitioner says unto the Court that in addition to being denied the rights guaranteed by the Sixth Amendment discussed above *there was the concomitant denial of the effective assistance of counsel* since the Petitioner's defense was based on the theory that pregnancy was material which was completely vitiated by the Trial Judge's ruling. It cannot be contended that effective assistance of counsel is limited to those cases where representation is a mere sham, *Powell* v. *Alabama,* 287 U.S. 45, 53 S. Ct. 55, 84 ALR 527, or where the Petitioner's counsel has a divided interest, *Glasser* v. *United States,* 315 U.S. 60, or where there is a complete absence of counsel, *DeMeerleer* v. *Michigan,* 329 U.S. 663, 67 S. Ct. 596.

Petitioner is entitled not only to know what he is charged with *but he is entitled to be effectively represented on the material elements of the charge.* In this case the record conclusively shows that the entire representation was devoted to attacking the issue of pregnancy. We feel the ruling of the Trial Judge therefore vitiated effective assistance of counsel within the scope of the Sixth Amendment. While courts may hesitate to grant a third trial, the unpopularity

of the accused should make the courts even more zealous to see that his constitutional rights are preserved.

Here the petitioner's defense was misled within the purview of *Berger* v. *U. S.*, *supra*, by the prejudicial ruling of the trial judge that vitiated the entire defense put in by petitioner's counsel to the allegation of pregnancy alleged in the indictment. As this Court stated in *Avery* v. *Alabama*, 308 U.S. 444:

> "Where denial of the constitutional right to assistance of counsel is asserted its peculiar sacredness demands that the court scrupulously review the record."

Therefore we ask this Court to grant the writ of certiorari to the judgment of the United States Court of Appeals for the District of Columbia Circuit.

2. The Ruling of the Lower Court That Pregnancy Is Immaterial in the Abortion Statute Passed by Congress for the District of Columbia is Incorrect and Violates the Clear and Expressed Legislative History of the Act Which Definitively Shows That It Was a Plain, Every-Day Abortion Statute Typical of Those in the Great Majority of the States Which Require Pregnancy to be Shown as a Constituent Element of the Offense

We invite the Court's attention to the reading of the Abortion Statute which reads as follows:

> "Whoever with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug or substance whatever, or with like intent uses any instrument or means unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than 5 years; or *if the woman or her child* dies in consequence of such act, be imprisoned for not less than 3 nor more than 20 years."

The first Code for the District of Columbia was enacted in 1901 and the Abortion Statute above appeared in that volume. The 1901 Code was adopted by the 56th Congress. We invite the Court's particular attention to the language

of the statute which refers to "the woman or her child". This phraseology defines the word "any woman" which appears in the initial part of the statute. To give it any other construction leads to an absurdity. If the Government's contention is correct in this case, every accused who has been convicted of abortion has been illegally sentenced because in every abortion there is a death of a child in utero since the common law distinctions between a woman with child and a woman quick with child have been abrogated in the statute. If the Government construction of this statute is correct and if the lower court's construction of the statute is correct, then in all cases an accused must be sentenced to a term of from 3 to 20 years because, as stated above, in every abortion the period of gestation is disturbed. The only other construction that could be placed on the statute if the lower court's opinion is to stand and that leads to an equal absurdity in construction is that all defendants charged with abortion will receive the minimum sentence if an unsuccessful attempt is made to disturb the gestation period and that if the abortion is a completed abortion and thus results in the death of the child in utero or the death of the woman, the maximum sentence of 3 to 20 years must be imposed. The Petitioner has been tried on four other occasions for the charge of abortion and has been acquitted. This fact, however, cannot justify a Court in construing this statute in a manner plainly inconsistent with the intent of Congress at the time the statute was passed.

The 1901 Code which was adopted for the District of Columbia was the work of a special committee of the Bar Association and the draft of the 1901 Code was submitted to all the judges of the Supreme Bench of the District of Columbia. The only report which was issued in connection with the adoption of the District of Columbia Code was H.R. 1017 of the 56th Congress. We now call the Court's attention to the following passages from the Congressional Record which, as far as counsel can ascertain, comprise the total hearings on the District of Columbia Code:

From 3585 of the Congressional Record, Mr. Underwood stated:

> "I would like to ask the gentleman from Wisconsin if he does not propose to give some explanation to the House as to the effects of the amendments covered in the Bill. I notice that some of them change the criminal law of the District and I do not think the House ought to be called upon to vote on a proposition of this kind without knowing what it is voting on."

Now Mr. Babcock:

> "I want to say to the House, Mr. Speaker, that most of the amendments, outside of one *relating to the divorce laws, are immaterial.* * * *"

We call the Court's attention to the following references to the Congressional Record which relate to the passage of the 1901 Code:

(NOTE: All the pertinent references to the Congressional Record relating to the passage of the 1901 Code are as follows:

> 2366, 2385, 2413, 2501, 3197, 3495, 3496, 3585, 3555, 3603 and 4024.

U. S. House Reports, Volume IV, Nos. 808-1078, 56th Congress, First Session. (Bill No. 9835.)

In the lower court's opinion holding that pregnancy is immaterial, the Opinion states:

> "But the Code of 1901 omitted all references to pregnancy and adopted the phrase "any woman" which has since been retained. A similar change in the English statute has long been recognized as making pregnancy unnecessary. We think the change in our statute has the same effect."

Petitioner asserts the fallacy of this argument is that the English statute and the Massachusetts statute and other statutes which have eliminated pregnancy as an essential

element have eliminated all words *connoting pregnancy such as child, unborn* child, *woman quick with child.* The *District of Columbia statute did not eliminate such references* and in the last three or four lines of the statute the word "any woman" is defined as a "woman or her child". It is significant to note that in those States that have eliminated pregnancy, the statutes contain specific language making pregnancy immaterial or, as in Massachusetts or England, all reference to pregnancy and all references to a child are eliminated. While it may be within the legislative wisdom to pass a statute such as the one in England or the one in Massachusetts, there is not a scintilla of legislative history to suggest that Congress intended to pass such a statute for the District of Columbia and on the contrary the great majority of the States who elect representatives to Congress require pregnancy to be shown as a constituent element of the offense of abortion. In fact at the present time the following states still require pregnancy to be shown:

District of Columbia: D. C. Code, 1940, Chap. 2, Sec. 22, Title 201.
Arkansas: Arkansas Statutes, 1947, Title 41, Sec. 301.
Connecticut: General Statutes of Conn., Rev. of 1949, 1930, S. 6056.
Georgia: Code of Ga., Ann., Title 26, Sec. 1102.
Idaho: Idaho Code, Title 18, Sec. 601, Chap. 6.
Louisiana: La. Rev. Statutes 1950, Chap. 1 & 87.
Maine: Revised Statutes of Maine, Chap. 121, Sec. 9.
Maryland: Ann. Code of Md., Article 27, Sec. 3.
Michigan: Compiled Laws of Mich., 1948, 750. 14.
Mississippi: Miss. Code, 1942, Sec. 2223.
New Hampshire: Rev. Laws of N.H., 1942, Sec. 12, p. 1826.
New Jersey:
New Mexico: New Mexico Statutes, 1953, Sec. 43, Sub. 1.
North Carolina: Gen Statutes of N.C. Recompiled 1953, Title 14, Sec. 44.
North Dakota: North Dakota Revised Code of 1943—1, Title 12, Sec. 2501.

Oklahoma: Oklahoma Statutes Ann., Title 21, Sec. 861.
Oregon: Oregon Revised Statutes, 163.060.
South Carolina: Code of Laws of S.C. 1952, Title 16, Sec. 83.
Texas: Vernon's Penal Code of the State of Texas, Article 1191, 1071, 641, 536.
Utah: Utah Code Ann., 1953, 76-2-1.
Vermont: Vermont Statutes, Revision of 1947, 8474.
Virginia: Code of Virginia, 1950, Title 18, Sec. 68.
West Virginia: W. Va. Code of 1949, Sec. 5923.

The following States have by specific words in the statute eliminated pregnancy as an element:

Wyoming	Nevada
New York	Missouri
Washington	Kentucky
Minnesota	Delaware
Rhode Island	Indiana

The following States are those States referred to in the Opinion of the lower court and these States have specifically eliminated any reference to pregnancy, child or woman quick with child and thus have eliminated pregnancy:

Pennsylvania	Massachusetts
Tennessee	California
Florida	Ohio
Iowa	

The Petitioner has been sentenced from 20 months to 5 years in the penitentiary and we feel the statement in the Opinion of the lower court—"We think the change in our statute has the same effect"—is not supported by close and searching study of the legislative history of the Abortion Statute.

This Court on numerous occasions has warned of the vice inherent in repeal by implication and we feel that in a criminal statute where the liberty of a defendant is involved this practice should not be indulged in. This is particularly true in this case where the 1901 Code was

the product of lawyers and judges in the District of Columbia and has for years been construed as requiring pregnancy to be shown. It should not now be changed in order to sustain the conviction of an unpopular accused. The construction of the Federal statute by the lower court is erroneous and we feel that this Court should grant the Writ of Certiorari to the judgment of the United States Court of Appeals for the District of Columbia Circuit.

CONCLUSION

For the reasons stated, the Petitioner asks that the Writ of Certiorari be granted.

Respectfully submitted,

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